DEPARTMENT OF LABOR SIDESTEPS REQUIRED PROCEDURES

Introduction

Government can use its authority to help or hinder the 21st century workplace. One safeguard against abuse of this authority was established over 50 years ago in the Administrative Procedure Act (APA).[1] Under this act, an agency must follow procedures for "notice and comment" in order to write a new rule that binds the public. Except for procedural rules and general statements of policy, an agency must publish notice in the Federal Register, stating a schedule for all public proceedings, the legal authority for the proposed rule, and the substance of the proposed rule. The agency must then allow interested parties to submit written comments.

On November 25, 1997, the Occupational Safety and Health Administration (OSHA) published the Cooperative Compliance Programs (CCP) instruction[2] without following these APA procedures. In the accompanying press release,[3] OSHA explained that the CCP represented the nationwide expansion of an existing program that had helped 70 percent of Maine's 200 worst companies (companies with the highest injury rate) reduce serious injuries.

Unlike the Maine pilot program, which used workers' compensation data, the CCP relies upon injury and illness data OSHA began collecting in 1996 from manufacturing and other industrial companies with 60 or more employees. The 500 companies with either the highest injury and illness rates or the worst OSHA compliance records (or both) are not eligible for the CCP. The next 14,500 employers - those with injury rates double the national average - were to receive notices from OSHA advising them of their option to participate in the CCP. By accepting OSHA's offer to participate, an employer could reduce the chance of a safety and health inspection from 100 percent to 30 percent.

In the press release, Assistant Secretary of Labor for Occupational Safety and Health Charles N. Jeffress claimed "[t]his program offers employers a choice: partnership or traditional enforcement . . . Employers are not forced or required to join the CCP. Those that do join are placed on a secondary or tertiary inspection scheduling list. Those that elect not to join will remain on OSHA's primary inspection list."[4] As the press release described it, though, a participating employer must agree to establish a comprehensive safety and health program that fully involves employees, to find and fix hazards, to work toward reducing injuries and illnesses, and to provide OSHA with information from their annual injury and illness records as well as other injury and illness data. The press release made no mention of any particular hazards or abatements that OSHA intended for CCP participants to address.

The Legal Challenge

On January 22, 1998, the Chamber of Commerce of the United States (Chamber), the National Association of Manufacturers, the American Trucking Association and the Food Marketing Institute filed a Petition for Review of the CCP in the Court of Appeals for the D.C. Circuit.[5] Asking the court to vacate the CCP, the parties argued that OSHA was using the instruction to force new substantive requirements on employers in circumvention of the notice and comment provisions of the APA. The parties also argued that the CCP's methodology for targeting employers violates the Fourth Amendment's guarantee against unreasonable searches.

According to the Chamber's press release, 12,500 employers had received notices from OSHA requiring them, by January 1998, to either comply with the requirements of the cooperative compliance program or face certain wall-to-wall inspections. The press release points to an appendix to the CCP that outlines a rating system for use by agency inspectors. According to Stephen Bokat, Chamber Vice President and General Counsel, this system includes measures, such as ergonomics, that are not required by current agency standards.

In February 1998, the Court of Appeals issued a stay, which placed the CCP on hold pending its decision.[6] The court issued its final decision in April 1999, striking down the program primarily based on OSHA's failure to follow formal rulemaking procedures.

American Worker Project Activity

In a May 1998 hearing before the Subcommittee, Marshall Breger observed that the CCP represents an agency strategy to encourage the regulated community to engage in what he called "supererogatory conduct" - that is conduct above that required by law. Mr. Breger, a Visiting Professor of Law at the Columbus School of Law, is a former Solicitor of Labor and also served as Chairman of the Administrative Conference of the United States (ACUS).[7] He is also the author of Regulatory Flexibility and the Administrative State, recently published by the Tulsa Law Journal.[8]

Mr. Breger told the Subcommittee that "promoting voluntary activity that goes beyond the letter of the law can only be a good thing. And this, I believe, is generally correct - if the conduct being encouraged is one, which a company already has a legal obligation to undertake." But he also warned that "unless carefully monitored, real problems of legal propriety can emerge…This is particularly true when the regulatory action - as for example, the establishment of worker management safety committees in an OSHA CCP program - is one which would have companies assume an obligation not now required by law and indeed one which Congress has previously refused to add to the OSH Act." Mr. Breger reminded the Subcommittee that only those regulations that are published under the APA's notice and comment procedures have "the force of law."

OSHA Assistant Secretary Charles Jeffress also testified. "It has now been three years since President Clinton announced the 'New OSHA,'" Mr. Jeffress opened. "Since then we have developed or improved a broad range of partnership programs that promote cooperative efforts between employers, workers, and government." Mr. Jeffress described the CCP's background for the Subcommittee, beginning with the "Maine 200" program and the injury and illness data OSHA collected in order to target CCP participants. Though he conceded that OSHA did not submit the CCP for notice and comment as contemplated by the Administrative Procedure Act, he stated that OSHA "spent months publicizing the program through stakeholder meetings, outreach sessions, and direct mailings. More than 20,000 people attended OSHA's CCP stakeholder meetings."

Mr. Jeffress also emphasized that as a matter of policy, the CCP program has great utility: "The CCP helps OSHA leverage its resources and protect more workers than it could through traditional enforcement. Because CCP participants agree to step up their safety and health efforts, enabling OSHA to forego scheduling inspection visits at many of their facilities, OSHA has more resources to devote to the remainder of its inspection program." While the American Worker Project hesitates to prejudge this case, we do not believe that "utility" is a basis on which OSHA can circumvent its legal obligation to the regulated public to follow the notice and comment requirements of the APA.

The final witness on the panel was Baruch A. Fellner. Mr. Fellner is a partner at the Washington law firm of Gibson, Dunn, and Crutcher and is counsel for the Chamber in its suit challenging the CCP. As a former attorney for the Labor Department who now represents employers in OSHA matters, Mr. Fellner opines that "the very threat of a comprehensive OSHA inspection is extraordinarily daunting and intimidating . . . Employers fear the disruption of their business; they fear the many hours they will have to devote to the inspection; and of course they fear the government finding an error - however trivial and technical - and the prosecution that could follow." In a direct challenge to Mr. Jeffress, he repeated that "OSHA has touted that 10,000 workplaces enlisted in its CCP program rather than be comprehensively searched. That is a measure of the program's coerciveness, not its popularity."

Most importantly, the CCP also presents its target employers with "requirements" that do not exist under current OSHA standards. By Mr. Fellner's count, CCP participants are subjected to nine new requirements, the most significant and controversial of these being ergonomics. "We have shown in our brief [to the court of Appeals]" said Mr. Fellner "that the CCP program was intended from the start to address supposed ergonomic conditions: OSHA targeted industries that it believed needed ergonomic regulation." Mr. Fellner pointed to the CCP appendix which he said "makes clear that employers were to adopt ergonomic measures as part of the program's requirements." Mr. Fellner also stated that "OSHA's briefings on the program and its early inspections under the program focused on ergonomics, as the agency knew and intended they would."[9] In Mr. Fellner's opinion the CCP "is a plain attempt to force ergonomic changes without the opportunity for informed decision making and participatory democracy that notice and comment provide."

Another controversial CCP requirement is comprehensive health and safety programs. Mr. Fellner characterized this as "OSHA's top priority for notice and comment rulemaking - it has been a top priority for several years but OSHA has been unable to put together even a proposed rule."[10] Mr. Fellner charged that OSHA has used the CCP to "impose requirements that have not and in all likelihood could not be justified in notice and comment, or upheld on judicial review . . . through the threat of wall-to-wall inspection for non-compliance."

Trendsetter List

Another Department of Labor program instituted without APA notice and comment rulemaking was the garment industry "Trendsetter List." The Wage and Hour Division of the Employment Standards Administration, maintained the "Trendsetter List." The list was designed to recognize those garment retailers and manufacturers that agreed with the agency to contract with suppliers who privately monitor contractors' compliance with applicable workplace laws. The American Worker Project questioned the arbitrary nature of the Trendsetters List during several hearings (See Appendix 4). After the final hearing held on the issue, the Trendsetter List was removed from the Department of Labor's web-site.

One victim of the Trendsetter List was Guess? Inc. The Department of Labor placed the company on probation at the beginning of the 1996 Christmas shopping season, at a time when it was opposing union organizing efforts in California. The Department's actions brought to light the government's use of "public relations" techniques to coerce certain types of conduct from regulated parties. While a company can seek redress against the government for unsupported accusations made in public, this relief is often inadequate because the last thing a company attacked in the media wants to do is call more attention to itself through efforts clear its name. The damage done to its competitive posture can be so great today that it may be too late by the time these legal proceedings can run their course. Government should not use these techniques unless the need to notify the public of an impending danger is great, or until the regulated entity has been given the opportunity to defend itself before a neutral forum.

Findings and Recommendations

- Congress should reevaluate the APA as a whole, and update appropriate protections, to reinforce an individual's right to fully participate in government.

- Congress, with the help of the private sector, should maintain a watchful eye on all new agency initiatives to determine if they contain new substantive requirements and then demand compliance with the APA's notice and comment provisions. Congress should not allow any agency's regulatory agenda to circumvent the APA.

- Congress should work with the U.S. Department of Labor to achieve many of the objectives that motivated the "Trendsetters" program while at the same time, eliminating the procedural flaws that plagued the program. Since the objective sought by "Trendsetters" was an essential part of the Department's submission under the "Results Act," the American Worker Project recommends that the Congress meet with officials of the Department to revise this program in a manner beneficial to the enforcement of the Wage and Hour laws.

- Each relevant Committee in Congress should conduct oversight hearings into the government's use of "adverse publicity" against regulated parties. If appropriate, on the basis of what is learned, Congress should further restrict government's ability to injure the competitive posture of a business entity through the imposition of government initiated "adverse publicity."

- Congress should seriously consider legislation that imposes specific criteria for the use of adverse publicity against a regulated entity.

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[1] 5 U.S.C. § 553; *see* Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 (1979); Batterton v. Marshall, 648 F.2d 694, 701 (D.C. Cir. 1980) ("Advance notice and public participation are required for those actions that carry the force of law.").
[2] CPL 2-0.119.
[3] OSHA Press Release: OSHA Expands Cooperative Compliance Programs to Reduce Injuries and Illnesses in the Workplace, November 25, 1997.
[4] *Id.*
[5] U.S. Chamber of Commerce, et. al. v. Occupational Safety & Health Administration, No. 98-1036 (CA DC)
[6] See order dated February 17, 1998.
[7] Until it was dissolved in 1995, ACUS was a federal agency established by the APA that was specifically charged with improving administrative law and the regulatory process.
[8] Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L. J., Number 2, p. 325 (1996).
[9] See Brief of Petitioners Chamber of Commerce et al. at 4, quoting Richard Fairfax at November 17, 1997 Stakeholder Meeting that ergonomics would "predominate" the CCP.
[10] It would do so, moreover, without considering the TEAM Act implications of comprehensive safety programs that have troubled the Congress for years.